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Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1941

No. 863

I. B. MELVILLE and H. G. DAY, as Trustees of District Landowners Trust, DISTRICT LANDOWNERS TRUST, and I. B. MELVILLE and H. G. DAY,

Petitioners,

v.

ARTHUR WEYBREW, ELMER L. OUDERKIRK, MARJORIE DAVIS, ELLA BOSTWICK, GLEN M. BOSTWICK, ELIZABETH R. BOSTWICK, STEPHEN J. CUSTY, JOHN McHUGH, EGLI GOTTLIEB, TRAVIS C. SWEATT and FARMS SECURITY COMPANY, a Corporation,

Respondents.

PETITION FOR REHEARING

IRVING B. MELVILLE,
Security Building, Denver, Colo., Attorney pro se, and Attorney for the Other Petitioners Herein.

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Come now petitioners above named, by their attorney Irving B. Melville, and respectfully request the Court to reconsider its final judgment of dismissal entered on March 2, 1942, for the following reasons:

1. This Court on November 12, 1940, denied the petition for a writ of certiorari presented by the same parties in Cause No. 240 for the stated reason "that the application therefor was not made within the time provided by law."

The Colorado supreme court in that Case reviewed the proceedings of the trial court by virtue of the power granted under that portion of the Colorado Supreme Court Rule 18 (1 C. S. A., page 624) reading:

> "An order appointing, or denying the appointment of, a receiver * * * may be reviewed on error, before final judgment if prompt application for that purpose is made."

The record in the present Cause, No. 863, was prepared and presented for the writ of certiorari along identical lines of procedure as followed in Cause No. 240, and your petitioners assume that, because the parties are identical, this Court inadvertently was led to believe that petitioners and their attorney were attempting to violate the early announced and continued policy of this Court not to allow parties, who fail to file an application for a writ of review within the statutory time, to have such question reviewed until final judgment on all questions involved in the controversy has been entered in the trial court.

It certainly was not the intention of petitioners nor of their attorney to violate or to attempt to violate such policy of this Court, and they stoutly maintain that neither they nor their said attorney has done so.

2. In the *instant* Cause, No. 863, the writ of error issued out of the supreme court of Colorado to review the order of the trial court *in refusing to discharge* the receiver. The deleted portion, represented by three stars, in the above quoted paragraph of Supreme Court Rule 18, reads: "sustaining or overruling a motion to discharge" —in other words there are *two separate* and *distinct proceedings* that may be reviewed on error *before final judgment* is entered, the *one* to review the trial court's order in *appointing or refusing* to *appoint* a receiver, and the *other* in sustaining or overruling a motion *to discharge such receiver.*

As will be seen from the Record, the Motion to Discharge the Receiver was a formal typewritten motion filed and presented many months after the Record in Cause No. 240 had been determined by the supreme court of Colorado, and was and is *entirely separate* and *distinct* from said last mentioned Cause.

A copy of said motion, together with a notice of the time and place when it would be called for setting, were served on counsel for plaintiffs, and they appeared at said time, and were present at all hearings included in the Record filed in this Court.

The trial court *denied* the *motion* to *discharge* the *receiver,* and counsel for defendants saved an exception to such denial. A *separate* and *distinct transcript* of all proceedings therein was duly certified by the clerk of said trial court, together with a bill of exceptions certified by the official court

reporter (the trial judge refusing to sign the same on the ground that such Order was only intermediate) was *filed* in the *supreme court* of Colorado together with the *assignments of error,* and a writ of error issued out of said court to *review said proceedings* in the *trial court.*

The supreme court of Colorado on November 17, 1941, *affirmed* the *trial court's action in denying* the motion *to discharge the receiver,* and an assignment of error is specifically based thereon in the Petition for a Writ of Certiorari in this Court —and petitioners and their said counsel honestly believe they are entitled to this consideration.

3. Forthwith after presenting the Motion to Discharge the Receiver, plaintiffs in error made application to the said supreme court for permission to file a supplemental record of the proceedings of the trial court relating to the subsequent acts of the receiver, together with the reasons therefor, and served copies thereof on counsel for plaintiffs in error, who filed an answer under the rules, and the *question submitted was determined* by *said supreme court* in *favor of defendants.*

Thereupon counsel for defendants made a further application to said supreme court for permission to use *in connection* with *said Cause* the essential and material portions of the record on error in cause No. 14,634 as the same appears in designated volume 2 accompanying the application, and served a copy thereof on counsel for defendants in error, who within the time allowed by the Rules, filed a statement and brief opposing such

application, and plaintiffs in error filed a statement and brief in reply, and *inter alia* cited the previous decisions of the supreme court of Colorado holding that, in passing upon the question of the trial court's order in *sustaining or overruling* a *motion to discharge a receiver,* the supreme court had the right *to review all preceding orders touching* the *appointment* and *actions* of *such receiver.*

The above question was thus presented to the supreme court of Colorado, and, after consideration, said question was *determined in favor* of *plaintiffs in error.* Defendants in error then filed a comprehensive printed answer brief in the Case so made, and thereafter the supreme court of Colorado rendered its divided Opinion above referred to—and your petitioners and their counsel strenuously urge that the present Cause No. 863 is entirely separate and distinct from Cause No. 240, and that they are entitled to have the questions involved determined upon the merits.

4. Your petitioners and their counsel fully understand that it is in the discretion of this Court whether or not a Cause will be reviewed on Writ of Certiorari, but they desire to urge in this connection that this Nation is engaged in the most important War of all time, and every effort is being made to produce the essential farm products of all kinds to sustain human and animal life, not only for our own people but for all the people of the democracies.

The Record in this Cause shows that at least

40,000 acres of land, capable under irrigation of growing practically everything raised in any country, is now either lying idle and being allowed to grow weeds and return to its ordinary desert condition, or is being farmed as dry land only, although an ample supply of irrigation water can be obtained from the city of Denver and the use and continued development of the irrigation pumping wells would make the land blossom into productive and beautiful farms.

5. Petitioners and their counsel fully appreciate the necessity for the statutory limit of time within which a petition for a writ of certiorari may be lodged in this Court, but in this connection your petitioners wish to point out that the Record shows that their present counsel, Irving B. Melville, while a defendant in that action and nominally appearing as an attorney therein—in truth and in fact was ill for a long period and unable to take any part in the trial and in his seventy-seventh and seventy-eighth years of age.

The Record further shows that the trial court refused to allow your petitioners to employ any other attorney to prosecute a writ of error to review its orders and judgment, although the transcript of record, the bill of exceptions, and the great number of exhibits constituted an immense record for a sick and aged man to whip into shape to present to this court.

The Record further shows that for approximately fifteen years this counsel had devoted almost his entire time in conducting the District

Landowners Trust, and thereby being out of touch with the conditions surrounding the procedure in this Court; and the records of this Court will show that an Application for an extension of time was made to this Court by Air Mail from Denver in ordinary ample time, but was not delivered to the Clerk of this Court until the morning following the expiration of the three months period. No sick man, young or old, can do justice to an important lawsuit.

The above matters are set forth herein not as an excuse to meet the requirements, but only to show that it was not forgetfulness nor pure neglect on the part of counsel for petitioners.

6. As shown from the Record, no final judgment has yet been entered in said Case in the trial court, and, we submit, none will be until a writ is obtained from the supreme court of Colorado requiring the same to be done, if such a writ could be obtained.

The Record shows that I. B. Melville was examined at length both under the statute and direct by his own counsel, and that all the salient accounts and records of the District Landowners Trust were presented in the trial court, and all the important ones were made exhibits of record in the case.

The Record further shows that the receiver, to whom all the books and records were turned over by order of court, has only a few of the bank statements in his charge, and that all the others are kept in an unlocked room belonging to the

suite of his attorneys to which nearly everybody has access.

The Record further shows that no effort is being made to collect moneys owing to the Trust, the taxes are not being paid, and the buildings and fences are not repaired; that the District Landowners Trust, H. G. Day, and I. B. Melville have no further records and no further means to make an additional accounting than already has been made.

Petitioners respectfully submit that nothing further can be shown in a final judgment than is shown by the record at this time, and the entire property and assets will have then disappeared and a review by this Court would be a useless proceeding.

Respectfully submitted,

IRVING B. MELVILLE,
Security Building, Denver, Colo., Attorney pro se and Attorney for the other named petitioners herein.

This is to Certify that I, Irving B. Melville, have not presented this Petition for Rehearing for any purpose of delay, whatsoever, but solely for the reason of calling this Court's attention to the matters above set forth, and honestly believing has inadvertently overlooked or misconstrued such matters.

(Signed)
IRVING B. MELVILLE

End